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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LAMAR JORDAN,

Defendant and Appellant.

B171965

(Los Angeles County  
Super. Ct. No. TA071145)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Victoria M. Chavez, Judge. Affirmed.

Marcia C. Levine, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney  
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster and  
April S. Rylaarsdam, Deputy Attorneys General, for Plaintiff and Respondent.

Lamar Jordan appeals from the judgment entered following a jury trial that resulted in his conviction of first degree murder (Pen. Code, § 187, subd. (a))<sup>1</sup> during which a principal and he personally and intentionally used a firearm causing great bodily injury and death (§ 12022.53, subds. (b), (c), (d), & (e)). He was sentenced to prison for 25 years to life on his murder conviction, plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)).

Appellant contends his rights to due process and a fair trial (U.S. Const., 5th, 6th & 14th Amends.) were violated, because the trial court erroneously instructed the jury on eyewitness identification factors pursuant to CALJIC No. 2.92.

Based on our review of the record, we conclude CALJIC No. 2.92 was properly given and affirm the judgment.

### **FACTUAL SUMMARY**

We review the evidence in the light most favorable to the People and presume the existence of every fact the trier could reasonably deduce from the evidence that supports the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The following summary is based on this appellate standard of review.

On August 21, 2002, around 10:00 p.m., appellant and a shorter man, both dressed in dark clothing, approached Eddie Wolf, who was walking on Main Street near 87th Place in Los Angeles. The shorter man kicked Wolf to the ground. Appellant then shot Wolf at close range from about a couple feet away. Wolf sustained five gunshot wounds, three of which were separately fatal.

Ruben Basurta, Yesenia Garcia, and their five children were walking down Main Street on the way to their home on 89th Street when Wolf, a young African-American male who did not appear to be a “thug,” walked calmly past them in the opposite direction. Appellant and a shorter man then passed them. Garcia saw appellant holding

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

his hand at his belt buckle and believed the two were about to do something. They moved quickly towards Wolf. Basurta observed the shorter man kicking Wolf to the ground and the exchange of words among the three men. He and Garcia watched as appellant then shot Wolf.

Daniel Lopez, whose car was stopped at a red light at 87th Place, observed the shooting. After the shorter African-American man pushed the victim to the ground, the taller one shot the victim at close range. He and Maria Lopez, his passenger, were unable to identify either perpetrator.

At trial, Basurta testified that he did not see the faces of the two assailants when they first passed by. However, after the shooting, when the two ran back towards him, he saw the shooter. About a week or two afterwards, Basurta noticed appellant along with several others walking towards an abandoned house on 89th Street. Appellant looked at him but did not say or do anything at that time. Later, someone in a hooded sweatshirt who resembled appellant rode by Basurta's house several times and appeared to be looking for him.

Los Angeles Police Department (LAPD) officer Marcus Smith testified that, at the scene, Garcia, who appeared scared, did not want to speak with him but related she had observed the shooting.

Garcia testified that at the scene, she wanted to "do the right thing," but she was afraid she would be killed, because the perpetrators lived in the neighborhood. About a week after the shooting, however, Garcia told Detective Mark Hahn that the shooter had acne scars on his face; he was a thin African-American male around 28 years old; his hair was in a braided ponytail; and he appeared to be about six feet tall. When appellant was subsequently arrested, his face displayed acne scars.

On November 7, 2002, Garcia did not identify anyone from a six-pack photographic lineup. Although she recognized appellant in the lineup, she did not want to identify anyone, because of something Basurta told her prior to the lineup. Detective Hahn believed Garcia focused on appellant's photograph.

Sometime afterwards, Basurta and Garcia moved their family from the area for the safety of their children.

On December 11, 2002, Basurta and Garcia were shown the same photographic lineup. Basurta positively identified appellant as the shooter. Garcia also identified appellant.

On April 22, 2003, at a live lineup, Basurta approached the glass, looked closely at appellant, and identified him as the shooter. Garcia, who was scared, saw appellant but identified someone. She refused to move closer to the glass for a better look although she knew the lineup participants could not see her.

Subsequently, Basurta and Garcia moved to another part of California with the assistance of the LAPD.

Basurta identified appellant at trial. Garcia positively identified appellant at that time. She explained to Detective Hahn that her initial lies about certain details of the shooting were due to her fear for her family and her desire not to get involved.

Appellant denied committing the crime and testified he was elsewhere at the time. He also presented character evidence and expert testimony challenging the reliability of an eyewitness identification.

## **DISCUSSION**

Although recognizing “CALJIC No. 2.92 has been approved in general where witness identification is at issue,” appellant contends its “specific witness certainty factor is erroneous,” because “it was not balanced by an instruction referring to the defense’s expert witness” who disputed the validity of the certainty factor and “was tantamount to directing the jury to *reject* a portion of appellant’s defense.” We conclude CALJIC No. 2.92 was properly given.

As requested by the People, and without objection by the defense, the trial court orally instructed the jury pursuant to CALJIC No. 2.92 as follows:

“Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime charged. In determining the weight to be

given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness'[s] identification of the defendant, including but not limited to any of the following:

“The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;

“The stress, if any, to which the witness was subjected at the time of the observation;

“The witness'[s] availability following the observation to provide a description of the perpetrator of the act;

“The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;

“The cross[-]racial or ethnic nature of the identification;

“The witness'[s] capacity to make an identification;

“Evidence relating to the witness'[s] ability to identify other alleged perpetrators of the criminal act;

“Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;

“The period of time between the alleged criminal act and the witness'[s] identification;

“Whether the witness had prior contacts with the alleged perpetrator;

*“The extent to which the witness is either certain or uncertain of the identification;*

“Whether the witness'[s] identification is, in fact, a product of his or her own recollection and any other evidence relating to the witness'[s] ability to make the identification.” (Italics added.)

As appellant acknowledges, CALJIC No. 2.92 is a correct statement of the law. In *People v. Wright* (1988) 45 Cal.3d 1126, our Supreme Court concluded “CALJIC No. 2.92 or a comparable instruction should be given when requested in a case in which identification is a crucial issue and there is no substantial corroborative evidence. [Citation.]” (*Id.* at p. 1144.)

By failing to object below, appellant has forfeited his claim that it was error to give the italicized language in this case, because the uncontradicted defense expert testimony demonstrated a witness's certainty does not correlate positively with the accuracy of the witness's identification. (See, e.g., *People v. Kelly* (1992) 1 Cal.4th 495, 535 [trial court not expected to modify correct jury instruction absent request]; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 393 ["Mere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 71-75 . . . .)"].)

In any event, on the merits, we conclude his claim already has been resolved adversely to his position in *People v. Johnson* (1992) 3 Cal.4th 1183, and nothing new has been advanced to warrant revisiting this issue.

As in this case, the defendant in *Johnson* argued there was no evidence to support an instruction on the certainty or uncertainty of a witness's identification as a factor to consider, and that this instruction improperly implied the jury could not rely on the defense expert's uncontradicted testimony that "a witness's confidence in an identification does not positively correlate with its accuracy." (*People v. Johnson, supra*, 3 Cal.4th at p. 1231.)

In rejecting these arguments, our Supreme Court pointed out "the jury remained free to reject [the expert]'s testimony although it was uncontradicted. [Citation.] The trial court was not required--indeed, was not permitted--to instruct the jury to view the evidence through the lens of [the expert's] theory." (*People v. Johnson, supra*, 3 Cal.4th at pp. 1231-1232.)

The jury here was expressly instructed that it was up to the jury to decide whether or not to accept an expert witness's opinion: "You are not bound by an opinion. Give each opinion the weight you find it deserves. You may disregard any opinion if you find it to be unreasonable." (CALJIC No. 2.80.)

In other words, CALJIC No. 2.92 simply informs the jury of the appropriate factors, including the certainty factor, to consider in evaluating eyewitness identification

in a neutral context “without improperly invading the domain of either jury or expert witness.” (*People v. Wright, supra*, 45 Cal.3d at p. 1143.)

The impact, if any, of a particular factor “is best left to argument by counsel, cross-examination of the eyewitnesses, and expert testimony where appropriate.” (*People v. Wright, supra*, 43 Cal.3d at p. 1143.) In this regard, Dr. Robert Shomer, the defense expert, explained that although CALJIC No. 2.92 described the factors (including “the degree of certainty of the eyewitness”) which “come basically out of the research” used to evaluate eyewitness identification, the instruction “just says to consider them” without saying “how to consider these things.”

Accordingly, CALJIC No. 2.92, as given, did not present a danger that the jury would infer the certainty factor precluded them from relying on the defense expert’s opinion that certainty does not equate with accuracy in a witness’s identification.

For a contrary conclusion, appellant points out the *Johnson* court rejected the defendant’s claims based on an additional ground which is not present. In *Johnson*, but not here, “the jury was instructed that it should consider ‘[t]estimony of any expert regarding acquisition, retention, or retrieval of information presented to the senses of an eyewitness.’” (*People v. Johnson, supra*, 3 Cal.4th at p. 1232.) Based on this instruction, if the jury found persuasive the expert’s testimony, then “the instructions allowed it to infer that [the witness]’s positive identification was not necessarily an accurate one.” (*Ibid.*)

This distinction is without a difference. The purpose of the second instruction in *Johnson* simply was to encourage the jury to focus on the underlying basis of the expert’s opinion in determining what weight, if any, to accord it. In determining the weight to give an expert’s opinion, the jury in this case was specifically instructed to consider “the facts or materials upon which each opinion is based.” (CALJIC No. 2.80) The jury is presumed to have understood and adhered to this instruction. (See, e.g., *People v. Pinholster* (1992) 1 Cal.4th 865, 919; *People v. Holt* (1997) 15 Cal.4th 619, 662.) In following this instruction, the jury, as in *Johnson*, was entitled to find a witness’s

confident identification did not necessarily equate with an accurate one if the jury found the expert's testimony persuasive.

Dr. Shomer opined that an eyewitness's confidence does not necessarily mean his or her identification is accurate. He explained that witnesses may be confident but their identifications are still inaccurate, because, in essence, people often think of their perceptions as reflecting "a version of a story or the scenario or the sequence" of a movie picture and "[s]o people could become very confident about a version that they saw, without that version being absolutely accurate. And very often we see 'A' and we see 'C,' and because there must have been a 'B' in there somewhere, we assume that we also saw 'B.' And then when we later report it, we report oh, I saw 'A,' I saw 'B' and I saw 'C.' When, in fact, normal vision about these very emotional and sudden experiences are like glimpses -- disconnected glimpses, that later on when we report, we have a more comprehensive story." No deception or lying is involved. Rather, "[t]his is the way that we have come to believe that that's what happened. So we begin to report what we believe happened rather than just the disconnected bits and pieces of our seeing."

Moreover, "[o]nce we've reported that, we could become very committed to it, very confident about it, even if it is discrepant with the actual physical facts. And so the fact that somebody is confident of something doesn't necessarily mean they're right, especially if you asked me to assume the distance of a hundred yards. I mean, that's the length of a football field. That's a long way away to be accurate about seeing little details." Thus, the jury was not precluded from finding, based on the defense expert's testimony, that an eyewitness's confidence in his or her identification did not necessarily mean the identification was accurate.



**DISPOSITION**

The judgment is affirmed.

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GRIMES, J.<sup>\*</sup>

We concur:

EPSTEIN, P.J.

HASTINGS, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.